Kimanis Power Sdn Bhd v Sabah Electricity Sdn Bhd & Anor

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HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO BKI-24NCC(ARB)-2/12 OF 2013
CHEW SOO HO J
11 JUNE 2014

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Contract — Performance bond — Bank guarantee — Plaintiff obtained ex parte interim injunction to restrain beneficiary from calling on bank guarantee — Plaintiff alleged call on guarantee was unconscionable as beneficiary breached underlying contract with it — Whether court had to consider if dispute between parties based on underlying contract raised serious issues to be tried — Whether balance of convenience and justice of case favoured continuance of injunction and preservation of status quo until dispute between parties resolved/determined

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The plaintiff and the first defendant ('D1') entered into a contract for the plaintiff to design, construct and provide a facility that would generate and deliver electricity to D1. Clause 7 of the contract provided that the plaintiff would pay D1 RM240,000 per day as liquidated damages if it failed to achieve the contractual 'commercial operation date' of the facility. In compliance with the contract, the plaintiff provided D1 with a RM43.2m performance bond in the form of a bank guarantee issued by the second defendant ('D2') to secure the payment of the liquidated damages. D1 called on the performance bond contending that the plaintiff had breached cl 7.1 of the contract by not achieving the commercial operation date for the first generating block on or before the specified date and was therefore liable to pay the liquidated damages. The plaintiff, on the other hand, alleged that the delay in achieving the commercial operation date was caused by D1. The plaintiff obtained an ex parte interim injunction restraining D1 from making any demand on the bank guarantee or from receiving any monies thereunder and in the event it had already received such monies, from dealing with the monies in any manner whatsoever until the final disposal of the instant action. The plaintiff did not apply for any order to restrain D2 in any manner whatsoever in relation to the bank guarantee. In support of its application for the interim injunction, the plaintiff contended that D1's basis for making a demand upon the bank guarantee was wrong as the requirement for the plaintiff to pay liquidated damages under cl 7 of the contract did not arise because D1 failed, inter alia, to first make a demand upon the plaintiff for payment of the liquidated damages as it was obliged to do by cl 7.7 of the contract; that the failure to achieve the scheduled 'commercial operation date' was caused by D1 and beyond the plaintiff's control; that the demand on the guarantee was in breach of the contract and unconscionable, inequitable and reprehensible; and that the balance of convenience lay in favour of allowing the injunction to continue

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until the final disposal of the action. D1, on being served with the ex parte injunction order, applied to set aside the same and the plaintiff's application was heard inter partes.

Held, allowing the interim injunction to remain in force until the final disposal of the dispute between the parties:

(1) In line with the principle of law enunciated by the Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* and endorsed by the Federal Court in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1, which was binding on this court, if the injunction was to restrain the beneficiary from calling upon the performance bond/bank guarantee, as in the present case, the court had to consider whether there were serious issues to be tried arising from the provisions of the underlying contract between the parties and whether the 'balance of convenience' lay in granting or in refusing an interlocutory injunction (see para 14).

(2) The contentions of the parties and the facts in their affidavits raised bona fide serious issues to be tried. The balance of convenience tilted in favour of granting the interlocutory injunction until the triable issues were resolved. The justice of the case favoured the status quo being maintained until the resolution/determination of the triable issues. Doubt was cast on D1's financial position – in the absence of its latest audited financial statement – to repay the liquidated damages if the same was paid out to D1 and if the plaintiff were to succeed in its claim. On the other hand, the plaintiff had shown that its financial standing was sound to undertake any damages arising from the grant of an interlocutory injunction (see paras 17–18 & 20).

[Bahasa Malaysia summary

Plaintif dan defendan pertama ('D1') memasuki kontrak untuk plaintif mereka, membina dan memperuntukkan kemudahan yang akan menjana dan membekalkan elektrik kepada D1. Klausa 7 kontrak memperuntukkan bahawa plaintif akan membayar D1 RM240,000 sehari sebagai ganti rugi pembubaran jika ia gagal untuk mencapai kontraktual 'commercial operation date' kemudahan tersebut. Dalam mematuhi kontrak, plaintif memperuntukkan D1 dengan bon prestasi sebanyak RM43.2m dalam bentuk jaminan bank yang dikeluarkan oleh defendan kedua ('D2') untuk menjamin bayaran ganti rugi pembubaran. D1 menggesa ke atas bon prestasi dengan berhujah bahawa plaintif telah memungkiri klausa 7.1 kontrak kerana tidak mencapai tarikh operasi komersial untuk blok penjanaan pertama pada atau sebelum tarikh yang dinyatakan dan oleh itu bertanggungjawab untuk membayar ganti rugi pembubaran. Plaintif, sebaliknya, mendakwa bahawa kelewatan dalam mencapai tarikh operasi komersial disebabkan oleh D1. Plaintif memperolehi injunksi interim ex parte menghalang D1 daripada

membuat apa-apa tuntutan ke atas jaminan bank atau daripada menerima apa-apa wang di bawahnya dan jika ia telah menerima wang sedemikian, daripada berurusan dengan wang dalam apa-apa cara sekalipun sehingga perlepasan akhir tindakan ini. Plaintif tidak memohon untuk apa-apa perintah untuk menghalang D2 dalam apa-apa cara sekalipun berkaitan jaminan bank. Dalam menyokong permohonannya untuk injunksi interim, plaintif berhujah bahawa asas D1 untuk membuat tuntutan ke atas jaminan bank adalah salah kerana keperluan untuk plaintif membayar ganti rugi pembubaran di bawah klausa 7 kontrak tidak berbangkit kerana D1 gagal, antara lain, untuk pada mulanya membuat tuntutan ke atas plaintif untuk bayaran ganti rugi pembubaran kerana ia bertanggungjawab untuk berbuat sedemikian oleh klausa 7.7 kontrak; bahawa kegagalan untuk mencapai 'commercial operation date' berjadual tersebut disebabkan oleh D1 dan melampaui kawalan plaintif; bahawa tuntutan atas jaminan adalah memungkiri kontrak dan tidak berpatutan, tidak saksama dan dikeji; dan bahawa imbangan kesenangan berpihak dengan membenarkan injunksi untuk berterusan sehingga perlepasan akhir tindakan. D1, dengan diserahkan perintah injunksi ex parte, memohon untuk mengetepikannya dan permohonan plaintif didengar inter partes.

Diputuskan, membenarkan injunksi interim untuk kekal berkuat kuasa sehingga perlepasan akhir pertikaian di antara pihak-pihak:

(1) Selaras dengan prinsip undang-undang yang ditetapkan dalam kes *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* dan disahkan oleh Mahkamah Persekutuan dalam kes *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1, yang mana mengikat ke atas mahkamah ini, jika injunksi adalah untuk menghalang daripada menggesa ke atas bon prestasi/jaminan bank, seperti dalam kes ini, mahkamah perlu mempertimbangkan sama ada terdapat isu serius untuk dibicarakan berbangkit daripada peruntukan asas kontrak di antara pihak-pihak dan sama ada 'balance of convenience' membenarkan atau menolak injunksi interlokutori (lihat perenggan 14).

(2) Penghujahan pihak-pihak dan fakta dalam afidavit mereka membangkitkan isu serius *bona fide* untuk dibicarakan. Imbangan kesenangan condong memihak untuk memberikan injunksi interlokutori sehingga isu yang boleh dibicarakan selesai. Keadilan kes memihak status quo dikekalkan sehingga resolusi/penentuan isu-isu yang boleh dibicarakan. Kesangsian diletakkan ke atas kedudukan kewangan D1 – dalam ketiadaan pernyataan audit terbaharunya – untuk membayar ganti rugi pembubaran jika ianya dibayar kepada D1 dan jika plaintif berjaya dalam tuntutannya. Sebaliknya, plaintif telah menunjukkan bahawa kedudukan kewangannya adalah bagus untuk membayar apa-apa ganti rugi yang berbangkit daripada pemberian

injunksi interlokutori (lihat perenggan 17–18 & 20).]

Notes

For a case on bank guarantee, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 5802.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Bocotra Construction Pte Ltd & Ors v Attorney General (No 2) [1995] 2 SLR 733, CA (refd)

Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd; Group Josi Re (formerly known as Group Josi Reassurance SA) v Walbrook Insurance Co Ltd [1994] 4 All ER 181; [1995] 1 WLR 1017, QBD (refd)

Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd [1978] 1 Lloyd's Rep 161, CA (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442, CA (refd)

LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor [2000] 3 MLJ 339, CA (refd)

Potton Homes Ltd v Coleman Contractors (Overseas) Ltd (1984) 28 BLR 19, CA (refd)

Royal Design Studio Pte Ltd v Chang Development Pte Ltd [1991] 2 MLJ 229, HC (refd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1; [2012] 3 CLJ 401, FC (folld)

Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4) [1998] 7 MLJ 551, HC (refd)

Legislation referred to

Rules of Court 2012 O 29 r 1, O 92 r 4

Evidence Act 1950 ss 102, 103

Catherine Chau (Catherine Chau & Assoc) for the plaintiff.
Gaanesh (Gaanesh & Co) for the defendant.
Adeline Tabad (Fernadez & Co) for the defendant.

Chew Soo Ho J:

INTRODUCTION

[1] Enclosure 2 is an ex parte notice of application dated 30 December 2013 filed by the plaintiff pursuant to O 29 r 1 of the Rules of Court 2012 and/or under O 92 r 4 which is the inherent jurisdiction of the court seeking the orders of court for (1) an interim injunction to restrain the first defendant from receiving the proceeds of any demand made under the Bank Guarantee No TJ 001G 001707 dated 18 June 2012 or in the event that the said proceeds have been received, for an order restraining the first defendant from transferring, utilising or dealing howsoever with the said proceeds, until the final disposal of this action; (2) an interim injunction to restrain the first defendant from demanding and/or making any further demand under the aforesaid bank guarantee until the final disposal of this action; and (3) costs.

[2] The grounds cited in support of encl 2 are, inter alia, that the demand made by the first defendant under the aforesaid bank guarantee was contrary to the express provisions in cll 6.2. and 7 of the power purchase agreement dated 16 February 2012 between the plaintiff and the defendant ('the contract') and without any cause and in breach of the contract and/or rules of natural justice; that the demand under the said bank guarantee was made on the basis that the plaintiff had defaulted in payment of liquidated damages under cl 7 of the contract by failing to achieve the contractual commercial operation date on 1 December 2013 on the default of the plaintiff or its contractors or agents when the alleged default in failing to pay the liquidated damages had not occurred as the first defendant did not send any payment request or itemised billing to the plaintiff for the liquidated damages as required under cl 6.2 of the contract; that pursuant to cl 6.3 of the contract, the parties are obliged to resolve any payment disputes in accordance with the dispute resolution procedure in cl 22.1 in an equitable manner through discussion and agreement between their respective designated representatives; that pursuant to cl 7.7 of the contract, the first defendant will only be permitted to demand payment under the said bank guarantee when first defendant had demanded the plaintiff to pay the liquidated damages which the first defendant had not done so thereby depriving the plaintiff the opportunity to object to or answer the payment claim; that the demand made by the first defendant under the said bank guarantee was, inter alia, in breach of the contractual procedure for payment; further and in the alternative, that the failure to achieve the scheduled commercial operation date was due to the faults or defaults of the first defendant and the causes of the delays were caused by the first defendant

beyond the control of the plaintiff; that it is manifestly unconscionable, inequitable and/or commercially unacceptable to compel the plaintiff to fund the proceeds of the bank guarantee on the facts unless restrained by an injunction; that the balance of justice lies in favour of granting the injunction to maintain the status quo until the disposal of this action. Other reasons are as set out in the affidavit filed in support of this encl 2. On 31 December 2013, this court granted the ex parte interim order.

[3] Upon the interim order being served on the defendants, the first defendant opposed the interim order granted and has duly filed its affidavit in opposition.

[4] The second defendant is the bank in which the said bank guarantee was issued but it is not opposing this application.

[5] The application was then heard inter parte.

BRIEF BACKGROUND FACTS

[6] The plaintiff and the first defendant had entered into a power purchase agreement dated 16 June 2012 ie the aforesaid contract in respect of the project known as Kimanis Power Project – 300 MW Combined Cycle Power Plant wherein the plaintiff is to design, construct, own operate and maintain an electricity generating facility with a nominal capacity of 285 megawatts at Kimanis, Sabah to generate and deliver electrical energy and generating capacity to the first defendant.

[7] On 18 June 2012, in compliance with cl 7.7 of the contract, the plaintiff had provided a performance bond in the sum of RM43,200,000 vide the bank guarantee from the second defendant, the CIMB Islamic Bank Bhd, as security for the payment of the liquidated damages as stipulated in cl 7 of the contract.

[8] In the course of the performance of the contract, first defendant alleged and contended that the plaintiff had delayed performance and had not achieved the commercial operation date for the first generating block on or before the scheduled date which was on or before 1 December 2013 and had consequently demanded for liquidated damages under the bank guarantee. The plaintiff on the other hand alleged that the said delays were attributed to the acts of the first defendant and were beyond the plaintiff's control.

[9] On account of the alleged breach by the plaintiff, the first defendant had proceeded to make calls on the bank guarantee on 16 December 2013, 24 December 2013 and 30 December 2013 respectively. The plaintiff, however, applied and obtained an ex parte interim injunction on 31 December 2012 to restrain the first defendant from receiving the proceed or in the event that the proceeds have been received, from transferring, utilising or dealing with the proceeds and from demanding and/or making further demand under the bank guarantee. After service of the interim injunction dated 31 December 2013, the first defendant had filed its opposition and this application is then heard inter parte between the plaintiff and the first defendant. The second defendant did not oppose this application since the plaintiff is not applying for any order to restrain the second defendant in whatever manner in relation to the said bank guarantee.

FINDINGS OF THE COURT

[10] The law relating to interlocutory injunction pursuant to O 29 r 1 of the Rules of Court 2012 is well settled in that the court must consider whether there is bona fide serious issue to be tried, whether the balance of convenience or justice of the case lies in granting or refusing to grant the injunction considering the harm the injunction would produce by its grant and the harm that would result from the refusal, whether damages are adequate remedy, and if the relevant factors are evenly balanced that the court should maintain the status quo; see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (CA), inter alia.

[11] The plaintiff has provided an undertaking as to damages upon an injunction being granted. The first defendant in submission has cited various authorities such as *Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd; Group Josi Re (formerly known as Group Josi Reassurance SA) v Walbrook Insurance Co Ltd* [1994] 4 All ER 181; [1995] 1 WLR 1017; *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733 (CA) (S'pore); *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 (CA) and *LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339 at p 362 (CA), to contend that a 'serious issue to be tried' is not one of the grounds on which a court may grant an injunction against the beneficiary to stop payment by a bank under a performance bond, that the 'balance of convenience' principle is inapplicable to an irrevocable letter of credit or similarly to a demand performance bond, inter alia.

[12] On this point of law whether the principles propounded in *American*

Cynamid and adopted by our Court of Appeal in *Keet Gerald Francis Noel John*, inter alia, is applicable in the instant application, the plaintiff has relied on the Court of Appeal case of *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442 on the distinction between an injunction to restrain the beneficiary from making a call or a demand on a performance bond or to restrain the bank or issuer from making payment out of the performance bond to the beneficiary. In the former, the provisions of the underlying contract between the parties must be considered and cannot be disregarded and in the latter, if the performance bond is on demand and unconditional in nature, the bank or the issuer is obliged to pay the beneficiary based on the performance agreement without having to consider the underlying contract. Support of such principle of law is also seen in the Federal Court case of *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1; [2012] 3 CLJ 401 which affirmed, inter alia, the said principles laid down by the Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor*.

[13] The plaintiff contended that since the injunction applied for in this application is only against the first defendant and not the second defendant which also does not oppose this application, the provisions in the contract between the parties herein cannot be disregarded.

[14] Considering both contentions and the authorities advanced by both parties on this point, I am inclined to agree with the distinction drawn in the instant case which is in line with the principle of law enunciated by the Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd*'s case and endorsed by the Federal Court in *Sumatec Engineering and Construction Sdn Bhd*'s which this court is bound that if the injunction is to restrain the beneficiary from making a call or a demand on a performance bond or bank guarantee as in the present case, the provisions of the underlying contract between the parties must be considered and cannot be disregarded. Hence, I hold that the alleged 'serious issues to be tried' arising from the provisions of the underlying contract between the plaintiff and first defendant herein must be considered by this court in determining whether to grant or to refuse an interlocutory injunction. The balance of convenience which is the necessary consideration linked to the consideration of the serious 'issues to be tried is thus relevant and must necessarily be considered in such determination by this court. In short, the *American Cynamid* principles are applicable in the circumstances in the instant case.

[15] Parties have also submitted on the issue of unconscionability. Since the Federal Court in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* has accepted unconscionability as a separate and distinct ground to refrain a beneficiary from making a call on a performance bond and

that the doctrine of unconscionability allows the court to deny enforcement of a contract because of the abuses arising out of the contract and to prevent oppression and unfair conduct, the determination of which (unconscionability) is fact specific, I do not find the necessity to elaborate further. The words of the Federal Court on this doctrine of unconscionability is explicit and must be followed by this court.

[16] The more pertinent consideration that this court must embark is whether there is/are bona fide serious issue/issues to be tried arising out of the contract between the parties. The call on the performance bond by the first defendant for the payment of liquidated damages is premised on the contention that the plaintiff has breached cl 7.1 of the contract by not achieving the scheduled commercial operation date of the first generating block which was on 1 December 2013 and pursuant to the same clause, the plaintiff shall pay the first defendant RM240,000 per day as liquidated damages, inter alia. The plaintiff conversely, contended that the delays in achieving the scheduled commercial operation date were attributed to the first defendant itself in that the transmission lines, an essential pre-requisite work for the first generating block to receive supply of backfeed power with which the plaintiff could then commence testing and commissioning of the first generating block to achieve the commercial operation date, were supposed to be completed by the first defendant by 1 April 2013 but the said transmission lines were not and are yet to be completed. The first defendant had only provided a temporary transmission line on 15 November 2013; secondly, the first defendant is contractually required to provide backfeed power supply to the plaintiff no earlier than 1 July 2013 pursuant to cl 9.11 of the contract so that the testing and commissioning activities for the first generating block could be carried out for a period of five months before achieving the scheduled commercial operation date on 1 December 2013. However, the first defendant had only provided backfeed power supply on 26 November 2013 thereby leaving only five days for the plaintiff to undertake the testing and commissioning. It was contended that the first defendant had delayed for about five months. In addition, the plaintiff contended that the first defendant had delayed in providing the various aspects of the inter-connection facilities. It is thus submitted that first defendant's calls or making demand on the bank guarantee on account of their own delays, is unconscionable and reprehensible citing *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1991] 2 MLJ 229 where the beneficiary's call on the bond was similarly based on the delays in construction which were caused by the beneficiary's own default and the court held inter alia that it should not be inhibited from exercising its equitable jurisdiction to restrain the defendant from calling on the bond. Another case citied in support of the plaintiff's contention that the first defendant ought not to be allowed to take advantage of the bank guarantee by its failure to perform or delays in the performance of its obligations under the contract, is *Potton Homes Ltd v Coleman Contractors (Overseas) Ltd* (1984) 28 BLR 19. Further

contention by the plaintiff relates to the non-compliance with the contractual procedural requirements under cl 6.2 (b) of the contract relating to the payment of liquidated damages and the calling on the bank guarantee by way 'of an itemised statement' from the first defendant 'setting out, in reasonable detail, the basis for such payment', the amount of which shall either be paid or objected to by the plaintiff with 30 days upon receipt. The first defendant contended that there is no necessity to have an itemised statement since the liquidated damages imposed are fixed under the contract.

[17] Looking at the contention of the parties and the facts raised in the affidavits filed herein, I must say that there are bona fide serious issues to be tried particularly whether the first defendant had contributed to the delays which had led to or resulted in the failure of the plaintiff to achieve the scheduled commercial operation date or it was due to the first defendant's own default that the scheduled commercial operation date could not be achieved and/or whether the first defendant had failed to adhere to the terms and conditions of the contract as to the procedural requirements before it made the calls on the bank guarantee for the liquidated damages and/or whether the plaintiff had in fact committed a fundamental breach of the contract which entitled the first defendant to the agreed liquidated damages simpliciter. I hold the views that the issues raised need to the inquired further in order to be able to determine whether the first defendant can be said to be entitled to the liquidated damages as covenanted under the contract. If it can be established that it was due to the first defendant's own default in its obligations under the contract, it would be unconscionable and inequitable for the call or demand on the bank guarantee when liquidated damages may not arise and be available to the first defendant under the circumstances. In any event, the issues are required to be tried before they can be properly and justly determined.

[18] Balance of convenience in the circumstances of this case will tilt in favour of granting the interlocutory injunction until the triable issues are resolved. With the bank guarantee in existence, the position of the first defendant is seen to be adequately secured if it is found ultimately that they are entitled to the liquidated damages. The plaintiff on the other hand would suffer greater loss having to satisfy the calls on the bank guarantee and that the plaintiff's position and reputation as a builder or contractor would be adversely affected. Vide exhs 'F17', 'F18' and para 23 of the plaintiff's affidavit in reply, it was submitted that the first defendant was commercially insolvent having incurred losses amounting to RM69+m after tax for its financial year ended 31 August 2011 and RM50+m after tax for its financial year ended 31 August 2012 while its liabilities for the year ended 31 August 2012 exceeded its current assets by RM504+m. The first defendant averred that it has fixed deposit of RM160m (exhs 'AR11(a)–(e)' annexed to the first defendant's further affidavit) in various financial institutions and that the first defendant had a credit balance

of RM144+m in its account with the CIMB Bank Bhd, Kota Kinabalu. The plaintiff submitted that the RM160m fixed deposits may well be the electricity deposits from the first defendant's clients as a pre-condition for the supply of electricity and the bank statement of the first defendant relating to the said CIMB Bank Bhd Kota Kinabalu (exh 'AR12' in the first defendant's further affidavit) shows a credit balance of RM56+m and not RM144+m. The first defendant has also failed to produce its latest audited financial statements to support its contention that it has sufficient funds to pay its liabilities including repayment of any amount received under the bank guarantee. I find doubt having been cast on the financial position of the first defendant in the absence of its latest audited financial statement being produced before this court to show its current financial status that it is able and capable of repayment of the said liquidated damages if they are paid out to the first defendant from the said bank guarantee provided by the plaintiff should the plaintiff succeed in its claim that it was not in breach of the contract. In the circumstances and in view of the serious issues to the tried as deliberated above pertaining to the alleged breach of the contract and/or failure to adhere to the obligations as stipulated in the terms and conditions of the contract, it is equitable that no party should be allowed to take advantage over the other; hence justice of the case would tilt to maintain the status quo of the parties until their triable issues are resolved or determined.

[19] On the question of whether damages are adequate remedy, I am inclined to agree with the plaintiff's submission that the court needs not expend energy to consider inter alia whether damages will be an adequate remedy when unconscionability is the consideration by the court in deciding whether an interlocutory injunction should be granted to restrain a beneficiary from calling on the bank guarantee citing the case of *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)*, a decision of the Singapore Court of Appeal. I am of the view that when an act is allegedly unconscionable, it is only just for the court to restrain any enforceability of the contract between the parties arising out of or being contributed by or attributed to such alleged acts of the party who is unconscionable. It is plainly not right for the court to allow related matters to such unconscionable act to proceed without restraint under the pretext that damages would be an adequate remedy as more harm than good would have occasioned in such circumstances. This court must therefore exercise its jurisdiction to restrain such alleged acts in order to do justice. It is only just and equitable that parties should resolve the primary issue whether there was a breach of the contract for liquidated damages as covenanted under the contract to be payable.

[20] On the ability and capability of the plaintiff to satisfy its undertaking for damages, the plaintiff's audited financial statements for year ended 31 December 2013 (exh 'F23' in the plaintiff's further affidavit in reply) shows

A that the plaintiff had a net credit balance of RM318+m, profit of RM18+m and a cash and cash equivalents of RM473+m. The plaintiff also produced its bank statements as at 31 January 2014 (exhs 'F16(a)–(u)' in its affidavit in reply) which show collectively that the plaintiff has a credit balance of RM426+m. I am satisfied that the plaintiff has shown its financial standing to be sound to
B undertake any damages arising out of an interlocutory injunction it sought. In the cited case of *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4)* [1998] 7 MLJ 551, Abdul Malik Ishak J (as His Lordship then was) held, inter alia, that the court will not embark, in practice, on an elaborate investigation as to the financial means of a particular plaintiff and
C that a bare undertaking for damages is sufficient. I do agree in instances where the opponent party is not challenging that undertaking for damages. However, if challenge is being taken, it is incumbent for the plaintiff to rebut it by producing sufficient evidence of its financial ability and capacity to satisfy the
D undertaking for damages pursuant to his evidential burden under ss 102 and 103 of the Evidence Act 1950. This is particularly so when the opponent party has been able to quantify his damages and/or that the damages is shown to be substantial. Having said that, however, if justice of the case so demands, even if the party seeking injunction is unable to show his financial standing for the
E damages, I am of the view that justice shall look at the rights of the parties and not merely their means and justice should override the need to show the ability and capability to meet the damages upon that undertaking.

F **[21]** Having considered all affidavit evidence and respective submissions and submissions-in-reply, and for the foregoing reasons, I allow the interim injunction to remain till the final disposal of the dispute between the parties herein either through the dispute resolution between the parties or the arbitrator as the parties have covenanted in the contract.

G **[22]** On the costs of this application, learned counsel for the plaintiff has proposed the sum of RM50,000 for both the ex parte and inter parte hearing while learned counsel for the first defendant offered the sum of RM15,000. I find that the issues in this application are not complex although some amount
H of work and research into law had to be undertaken followed by submissions and replies to submissions. I hold the view that a fair sum of costs in an application of this nature should not exceed RM10,000. Exercising my discretion in granting costs, I award cost to the plaintiff in the sum of RM8,000 against the first defendant with no order as to cost for the second defendant
I who does not object to and is not directly involved in this application.

Interim injunction allowed to remain in force until final disposal of dispute between parties.

Reported by Ashok Kumar